In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 260

MARTIN A. HIRSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 103–105) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 19, 1943 (R. 106). The petition for a writ of certiorari was filed August 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court correctly instructed the jury that, as a matter of law, petitioner's allegedly perjurious testimony before the grand jury related to a matter material to the inquiry of that body.

STATUTE INVOLVED

Section 125 of the Criminal Code (18 U. S. C. 231) provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

Petitioner was indicted for perjury in the United States District Court for the Southern District of New York. The indictment charged that on June 12, 1942, the grand jury for that district was inquiring into an alleged violation of the Anti-Racketeering Act of June 18, 1934, c. 569, 48 Stat. 979, 18 U. S. C. 420a *et seq.;* that on that date petitioner was sworn and examined

in the course of that inquiry; that petitioner, being under oath, wilfully, falsely, and contrary to his oath, testified that within one month and one-half prior to June 12, 1942, he loaned $5,000 in cash to one Leo Levy, well knowing the truth to be that he did not loan $5,000 to Leo Levy during such period; and that the matter to which petitioner falsely testified was material to the inquiry of the grand jury. (R. 4–5.)

The evidence adduced by the Government at the trial showed that during the years 1941 and 1942 the grand jury which indicted petitioner was investigating alleged violations of the Anti-Racketeering Act on the part of various representatives of the International Alliance of Theatrical Stage Employees and Moving Picture Operators, a labor union, and other persons. On the basis of evidence in its possession the grand jury concluded that over a million dollars had been extorted from members of the motion-picture industry. (R. 11–12, 16–18.) This investigation led to the return of two indictments (R. 11, 18–19, 82–83, 89–91), one of which, returned on September 29, 1941, charged one Nick Circella and another with violating the Anti-Racketeering Act (R. 11, 89–91). Circella's bail, fixed at $25,000, was furnished by petitioner, who deposited that amount in cash and executed a recognizance before the clerk of the district court (R. 12–13, 68–70). Circella subsequently pleaded guilty and was sentenced to imprisonment and to pay a fine of $10,000, whereupon

petitioner consented by a written stipulation to the payment of the fine from the cash bail. The fine was paid therefrom and the balance, $15,000, was returned to petitioner by the clerk in April 1942. (R. 14, 71–75.)

The grand jury, after returning the indictments already mentioned, was convinced that all the money extorted from members of the motion-picture industry had not gone to the defendants named therein. Among other things, the grand jury discovered that some of this money had gone to a "so-called mob in Chicago," and it felt that a careful investigation into the sources and disposition of the money involved would reveal the names of other persons involved in the "racket." (R. 12, 15–17, 20.) Accordingly, persons connected with those who had already been indicted were subpoenaed by the grand jury (R. 17). The grand jury also determined to investigate the source of the $25,000 in cash which had been deposited as bail for Circella, as well as the disposition of the $15,000 that remained after payment of his fine (R. 15–17).

On June 12, 1942, petitioner was called before the grand jury and testified under oath (R. 15). The stenographic transcript of his testimony before the grand jury (R. 46–67) was introduced in evidence at the trial (R. 10). This transcript shows that petitioner testified that the $25,000 cash was his own money which he had taken from his safe deposit box, that he posted it as bail for Circella, who

was a stranger to him, at the request of a friend named Rogers, and that he received no fee for the use of the money (R. 51–54, 59). He was then asked what he did with the $15,000 which was returned to him, and he replied that he put it back in his safe deposit box and later took $5,000 from the box and loaned it to a friend (R. 55–57). After an unsuccessful attempt to avoid revealing the name of this friend, petitioner first said that the loan was made to one Leo Levy, then retracted the statement and said that he made no such loan, and finally repeated his original statement that he did make such a loan to Levy (R. 56–59). Subsequently petitioner admitted, both in a voluntary statement to an assistant United States attorney (R. 76–78) and when he appeared a second time before the grand jury (R. 78–81), that he made no loan to Levy and that his testimony to that effect was not correct. He stated that he had loaned $5,000 to his brother, Irving Hirsch, but did not want to bring the latter's name into the case (R. 76, 79). At the trial, Levy, called as a witness for the Government, testified that he had never borrowed more than $15 from petitioner (R. 22, 25), while Irving Hirsch testified for the defense that he borrowed $5,000 from petitioner during the early part of May 1942 (R. 36).

At the outset of his charge to the jury the trial judge told them that the question whether petitioner's testimony before the grand jury related

to a material matter within the meaning of the perjury statute, was a question of law to be determined by the court, and he then charged the jury that the testimony was material and that the issues for their determination were whether it was false and wilfully so (R. 40).

Petitioner was convicted (R. 2, 44) and sentenced to imprisonment for two years and to pay a fine of $2,000 (R. 2, 45). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of conviction was affirmed (R. 103–106).

ARGUMENT

Although he does not purport to question the rule that the materiality of allegedly perjurious testimony is ordinarily a question for the trial court, not the jury, to determine,[1] petitioner asserts that the instruction of the trial court in the instant case that his testimony before the grand jury was material was based upon unwarranted assumptions of fact (1) that the $25,000 in cash deposited as Circella's bail was not petitioner's own money, and (2) that the loan which he falsely testified he had made to Levy was from part of

[1] *Sinclair* v. *United States*, 279 U. S. 263, 298–299; *Travis* v. *United States*, 123 F. (2d) 268, 270 (C. C. A. 10); *Blackmon* v. *United States*, 108 F. (2d) 572, 573 (C. C. A. 5); *United States* v. *Slutzky*, 79 F. (2d) 504, 506 (C. C. A. 3); *Luse* v. *United States*, 49 F. (2d) 241, 245 (C. C. A. 9), certiorari denied, 290 U. S. 651; *Carroll* v. *United States*, 16 F. (2d) 951, 954 (C. C. A. 2), certiorari denied, 273 U. S. 763; cf. *United States* v. *Shinn*, 14 Fed. 447, 452 (C. C. D. Ore.).

the bail money; and, hence, that the trial court should not properly have treated the matter of materiality as a question of law (Pet. 9–12).

(1) In respect of the matter of the ownership of the money, petitioner argues (Pet. 9–10) that since he testified before the grand jury that it was his (R. 52–53), and there was no proof that it was any part of the extortion money, it was no concern of that body what he did with it and therefore his false testimony concerning a loan to Levy could not have been material; and that, accordingly, the court's determination of materiality was predicated upon an assumption of a fact which was wholly without supporting proof. This argument rests upon a misconception of the true test of materiality as applied to the grand jury's investigation.

The test of materiality is whether the false testimony has a natural tendency to influence, impede, or dissuade the grand jury from pursuing its investigation. It is not necessary that such testimony concern any particular issue, and it need not directly affect the result. *Carroll* v. *United States,* 16 F. (2d) 951, 953 (C. C. A. 2), certiorari denied, 273 U. S. 763; *Blackmon* v. *United States,* 108 F. (2d) 572, 574 (C. C. A. 5); *United States* v. *Slutzky,* 79 F. (2d) 504, 506 (C. C. A. 3). False testimony in any step of the grand jury's investigation may tend to influence or impede the course of the investigation, and if so it is material

even though not essentially relevant to the ultimate issues. *Carroll* v. *United States, supra.*

Petitioner's false testimony was clearly material within the meaning of this rule. The grand jury, after returning two indictments, one against Circella and another alleged extortionist, determined to press their investigation into the disposition of the extortion money with a view to ascertaining the identity of others who, the jury was satisfied, were involved in the scheme. Quite naturally, their attention focused upon the $25,000 in cash which petitioner had deposited as bail for Circella, $10,000 of which was used to pay his fine, and their questioning of petitioner was designed to elicit information as to whether that money was part of the proceeds of the extortion scheme. If it was, petitioner's testimony as to what he did with the $15,000 remaining after the payment of Circella's fine was clearly material, for, as the court below said, "if he turned it over to other persons the jury might be able to connect them with the crimes under investigation" (R. 105). The materiality of petitioner's testimony in that regard was not affected by his assertion of ownership of the bail money. The grand jury was not bound to accept that claim and abandon further inquiry,[2]

[2] To the contrary, considering the facts that petitioner had testified that he took $25,000 in cash from his safe deposit box to bail Circella, who was a stranger to him, and this without any compensation to himself, and that he had consented to the payment of Circella's $10,000 fine from the bail money

for, as indicated, the disposition he made of the money had a material bearing upon the truth of his testimony that it was his own. The grand jury could accordingly ask any questions which threw light on the issue of the source whence petitioner obtained the money, including questions as to what he did with the balance of $15,000. All such questions petitioner was bound to answer truthfully, for any false answer as to the disposition he made of this money had a natural tendency to influence, impede, or dissuade the grand jury in its inquiry to determine whether the cash used for Circella's bail came from the moneys derived from the extortion plot. The materiality of petitioner's false testimony concerning a loan to Levy, therefore, cannot be doubted, notwithstanding his prior testimony that the bail money was his own.

(2) Petitioner also contends (Pet. 10–12) that there was an inconsistency in his testimony before the grand jury as to whether the $5,000 loan which he falsely testified he had made to Levy was from the $15,000 balance of the bail money returned to petitioner after the payment of Circella's fine. He argues that his testimony, subsequent to his false statement, that the $5,000 "came out of my box" and that he did not "know if it was the exact money or not" (R. 57), was inconsistent with his prior statement that the loan was

(see pp. 3–5, *supra*), it would seem clear that the grand jury was entitled to pursue this line of inquiry further in order to test the truth of this highly unusual story.

from the bail money (R. 55), and that this "disputed question of fact" (Pet. 10) should have been submitted to the trial jury. This contention is specious. The questioning of petitioner as to the identity of the borrower of the $5,000 and petitioner's false answer followed immediately after his testimony that he loaned $5,000 of the bail money to a "friend" (R. 55–56). We have already demonstrated (*supra*, pp. 7–9) the materiality of his false statement that the loan was to Levy. Obviously, its materiality was in no wise affected by his subsequent assertion of lack of knowledge as to whether the loan was made from the bail money. Indeed, in the light of the facts known to the grand jury at the time, it was unimportant whether the loan was in fact made from the bail money, for petitioner's actions in connection with the bail transaction would clearly have justified an inquiry into the sources of the other cash he had in his safe deposit box to determine whether it, too, was part of the proceeds of the extortion scheme.

CONCLUSION

The case was correctly decided below and it presents no conflict of decisions[3] or question of

[3] In *Clayton* v. *United States*, 284 Fed. 537 (C. C. A. 4), upon which petitioner relies as establishing a conflict of decisions (Pet. 13–14), the court held that it was immaterial, in an investigation concerning violations of the National Prohibition Act, for the grand jury to know whether the defendant had ever been intoxicated in the period of a year and a

general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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half preceding the investigation and that, therefore, his false testimony that he had not been was not punishable under the perjury statute. The court said that since intoxication was not an offense under the Prohibition Act, the grand jury had no right to inquire, as an independent subject of investigation, whether the defendant had been intoxicated, and that in any event the mere fact of his intoxication had no legitimate tendency to show that some other person had violated the act. The court stated, moreover, that its holding was based "upon the facts of this case, and without intending to lay down any absolute rule" (p. 541). This decision obviously does not support petitioner's assertion of a conflict with the decision below, for here, as we have shown (*supra*, pp. 7–9), petitioner's false testimony bore a direct and intimate relation to the subject of the grand jury's inquiry.

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